Ketua Pengarah Hasil Dalam Negeri v Continental Automotive Instruments (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R2–14–4–03 OF 2013
ZAKARIA SAM J
26 JUNE 2014

Civil Procedure — Appeal — Notice of — Failure to serve notice of appeal in opponent — Whether appeal not properly brought — Time limit for serving notice of appeal

On 15 August 2012, the Special Commissioners of Income Tax ('SCIT') had allowed the respondent's appeal against the assessment imposed by the appellant. Dissatisfied with the decision of the learned SCIT, the appellant filed a notice of appeal against the said decision on 27 September 2012. The notice of appeal was delivered to the clerk of the SCIT within the stipulated time in accordance with para 35 of Schedule 5 of the Income Tax Act 1967 ('the ITA'). According to the appellant the said notice of appeal was also served on the respondent on 27 September 2012. However, the acknowledgement copy was lost in transit. The respondent thus applied under O 55 r 3(4) of the Rules of Court 2012 ('the RC') to strike out the notice of appeal on the grounds that it was never served on them.

Held, allowing the respondent's application and striking out the appeal with costs:

(1) Where the notice of appeal is filed within time but not served on the respondent within time, the appeal is not properly brought. The appeal could only be said to be brought when the notice of appeal is served on the respondent (see para 20).

(2) The respondent was prejudiced by not being notified of the appeal in that the respondent conducted its financial affairs as if there was no appeal by the appellant (see para 21).

(3) The appellant's process server, in his affidavit stated he served the notice of appeal on the respondent on 21 September 2012. However, he could not have served the said notice on 21 September 2012 when the notice of appeal itself was dated 27 September 2012and was only served on the SCIT on 27 September 2012. The appellant also failed to produce the proof of service of the notice of appeal (see para 23).

(4) Although no time limit is provided for under para 35 within which the appellant has to serve a copy of the notice of appeal, by paras 42 and 42A

of Schedule 5, it can be implied that the appellant has to serve it on the respondent within the same period for the filing of such notice to the SCIT, that is within 21 days after the service of the order of SCIT on the appellant. Since the notice of appeal was not served on the respondent within the said period, the appeal was not properly brought; *Ahmad bin Yahya & Nor v Ahmad bin Sulaiman* [1972] 2 MLJ 109 referred (see para 29).

[Bahasa Malaysia summary

Pada 15 Ogos 2012, Pesuruhjaya Khas Cukai Pendapatan ('PKCP') telah membenarkan rayuan responden terhadap taksiran yang dikenakan oleh perayu. Tidak berpuas hati dengan keputusan PKCP yang bijaksana, perayu memfailkan notis rayuan terhadap keputusan tersebut pada 27 September 2012. Notis rayuan diserahkan kepada kerani PKCP dalam masa yang ditetapkan mengikut perenggan 35 Jadual 5 Akta Cukai Pendapatan 1967 ('ACP'). Mengikut perayu notis rayuan tersebut adalah juga diserahkan ke atas responden pada 27 September 2012. Walau bagaimanapun, salinan penerimaan juga hilang dalam perjalanan. Responden oleh itu memohon di bawah A 55 k 3(4) Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk membatalkan notis rayuan atas alasan bahawa ia tidak pernah diserahkan kepada mereka.

Diputuskan, membenarkan permohonan responden dan membatalkan rayuan dengan kos:

(1) Di mana notis rayuan difailkan dalam masa tetapi tidak diserahkan kepada responden dalam masa, rayuan adalah bukan dibawa secara betul. Rayuan tersebut hanya boleh dibawa apabila notis rayuan diserahkan kepada responden (lihat perenggan 20).

(2) Di mana notis rayuan difailkan dalam masa tetapi tidak diserahkan ke atas responden dalam masa, rayuan adalah bukan dibawa secara betul. Rayuan tersebut hanya boleh dibawa apabila notis rayuan diserahkan kepada responden (lihat perenggan 21).

(3) Proses penyerahan perayu, dalam afidavitnya menyatakan yang dia menyerahkan notis rayuan kepada responden pada 21 September 2012. Walau bagaimanpun, dia tidak dapat menyerahkan notis tersebut pada 21 September 2012 apabila notis rayuan itu sendiri bertarikh 27 September 2012 dan hanya diserahkan kepada PKCP pada 27 September 2012. Perayu juga gagal untuk mengemukakan bukti penyerahan notis rayuan tersebut (lihat perenggan 23).

(4) Walaupun had masa tidak diperuntukkan di bawah perenggan 35 di mana perayu mesti menyerahkan salinan notis rayuan, melalui perenggan 42 dan 42A Jadual 5, ia dapat disiratkan bahawa perayu mesti menyerahkan kepada responden dalam masa yang sama untuk

memfailkan notis sedemikian kepada PKCP, iaitu dalam masa 21 hari selepas penyerahan perintah PKCP kepada perayu. Memandangkan notis rayuan tidak diserahkan kepada responden dalam masa tempoh tersebut, rayuan tidak dilakukan secara betul; *Ahmad bin Yahya & Nor v Ahmad bin Sulaiman* [1972] 2 MLJ 109 dirujuk (lihat perenggan 29).]]]

Notes

For cases on notice of, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1529–1647.

Cases referred to

Ahmad bin Yahya & Anor v Ahmad bin Sulaiman [1972] 2 MLJ 109, CA (refd)
Chin Hua Sawmill Co Sdn Bhd v Tuan Yusoff bin Tuan Mohamed [1974] 1 MLJ 58, FC (refd)
Goh Gin Chye & Anor v Peck Teck Kian Realty Pte Ltd [1982] 1 MLJ 117, CA (refd)
Gurbachan Singh v Seagrott & Campbell (No 2) [1962] 1 MLJ 370, CA (refd)
Soh Keng Hian v American International Assurance Co Ltd [1996] 1 MLJ 191, CA (refd)

Legislation referred to

Income Tax Act 1967 Schedule 5 Paras 34, 35, 42 and 42A
Rules of Court 2012 O 55 r 3(4)

Arjunam Subramaniam (Shanker & Arjunam) for the respondent.
Ahmad bin Ishak (Inland Revenue Board of Malaysia) for the appellant.

Zakaria Sam J :

THE APPLICATION

[1] This is an application by the respondent (encl 2) under O 55 r 3(4) of the Rules of Court 2012 ('the RC') to strike out the notice of appeal filed by the appellant which the respondent alleged was never served on them.

BRIEF FACTS

[2] On 15 August 2012, the Special Commissioners of Income Tax ('SCIT') had allowed the respondent's appeal against the assessment imposed by the appellant.

[3] Dissatisfied with the decision of the learned SCIT, the appellant filed a notice of appeal against the said decision on 27 September 2012.

[4] The notice of appeal was delivered to the clerk of the SCIT within the stipulated time in accordance with Para 35 of Schedule 5 of the Income Tax Act 1967 (the 'ITA'). A

[5] According to the appellant the said notice of appeal was also served on the respondent on 27 September 2012. However, the acknowledgement copy was lost in transit. Due to that, the appellant has filed an affidavit of service sworn by Mohd Harmizi bin Omar, the process server of the appellant. B

[6] The respondent filed this notice of application to strike out the appellant's notice of appeal on the ground that it was never served on them. C

THE RESPONDENT'S ARGUMENT

[7] The notice of appeal has not been served on them to date. D

[8] It is the respondent's argument that under paras 42and 42Aof the Schedule 5 of the ITA, the appellant must serve their notice of appeal on them.

[9] They submitted that it would be an error of law to read paras 34 and 35 of the ITA in isolation from paras 42 and 42A. Paras 34, 35, 42 and 42A must be read together. E

THE APPELLANT'S ARGUMENT F

[10] The appellant submitted that nowhere in para 35, states that after the filing of the requisition under para 34, the said notice should be served on the respondent. There is no obligation on the appellant to serve the requisition under para 34 on the respondent. G

[11] It is also the appellant's argument that the notice of appeal was served on the respondent but the acknowledgement was lost.

[12] The appellant prays for respondent's application to be dismissed with costs based on the following grounds: H

(a) the notice of appeal dated 27 September 2012 was filed within the stipulated time stated under paras 34 and 35 of Schedule 5 of the ITA;

(b) the notice of appeal did not cause any prejudice to the respondent; I

(c) the respondent's application if allowed, will cause prejudice to the appellant;

(d) court can use its discretion to regularise the proceeding as failure to serve the notice of appeal is only a technicality and should not be allowed to obstruct the process of giving justice; and

(e) this court may direct service of the notice of appeal on the respondent pursuant to O 55 r 13 of the RC .

THE LAW

[13] To fully understand the arguments by the parties, reproduced below paras 34, 35, 42 and 42A of the ITA.

> Further Appeal
>
> 34. Either party to proceedings before the Special Commissioners may appeal on question of law against a deciding order made in those proceedings (including a deciding order made pursuant to sub-paras 26(b) or (c)) by requiring the Special Commissioners to state a case for the opinion of the High Court and by paying to the Clerk at the time of making the requisition such fee as may be prescribed from time to time by the Minister in respect of each deciding order against which he seeks to appeal.
>
> 35. A requisition under paragraph 34 shall be in writing and shall be sent or delivered to the Clerk within twenty one days after the service on the intending appellant of the order against which he seeks to appeal.
>
> 42. Unless it is otherwise provided by rules of court, the rules of court for the time being in force in relation to appeals in civil matters from a subordinate court to the High Court and from the High Court in its appellate jurisdiction to the Court of Appeal and the Federal Court shall, subject to this Schedule, apply with the necessary modifications to appeals under this Schedule to the High Court, the Court of Appeal and the Federal Court respectively.
>
> 42A. Where any matter of procedure or practice is not provided for in this Schedule, the procedure and practice for the time being in force or in use in the subordinate court or in the High Court, as the case may be, shall be adopted and followed with the necessary modifications.

FINDINGS

[14] Learned counsel for the appellant submitted that nowhere in para 35 of Schedule 5 stipulated that after the filing of the requisition under para 34 to the clerk of the SCIT, the said notice should be served on the respondent.

[15] With due respect, I do not think that is the law.

[16] By paras 34 and 35 a party may appeal on point of law to High Court by requiring the SCIT to state a case for the opinion of the High Court. A requisition must be in writing and shall be delivered to the clerk within 21 days

after the appellant received the deciding order. A

[17] Gopal Sri Ram JCA (as he then was) in *Soh Keng Hian v American International Assurance Co Ltd* [1996] 1 MLJ 191 said (at p 194) that:

> An appeal is brought to this Court by filing and serving the notice of appeal. The one act without the other renders the appeal incompetent. B

[18] An appeal is only brought into existence when the said notice of appeal is served on all the affected parties: *Gurbachan Singh v Seagrott & Campbell (No 2)* [1962] 1 MLJ 370; *Chin Hua Sawmill Co Sdn Bhd v Tuan Yusoff bin Tuan Mohamed* [1974] 1 MLJ 58. C

[19] The object of the service is to make sure that all the necessary parties will receive due and proper notice of the case they have to meet: *Goh Gin Chye & Anor v Peck Teck Kian Realty Pte Ltd* [1982] 1 MLJ 117. D

[20] Where the notice of appeal is filed within time but not served on the respondent within time, it had been held that the appeal was not properly brought. The appeal could only be said to be brought when the notice of appeal had been served on the respondent. *Gurbachan Singh*'s case. E

[21] I also agree with the submission of learned counsel for respondent that the respondent is prejudiced by not been notified of the appeal in that:

(a) the respondent conducted its financial affairs as if there was no appeal by the appellant. The respondent, thinking there was no appeal, made no provision for any tax; F

(b) the respondent continued his model of business ie renting plant and machinery in Thailand as there was no appeal by the Director-General. The respondent made no changes to their model of business overseas in Thailand; and G

(c) the respondent is not being able to cross-appeal, if any.

Was the notice of appeal served on the respondent H

[22] The appellant in the same breath claims that the notice of appeal had been served on the respondent, the said notice was however served on the respondent. Mohd Harmizi bin Omar, the appellant's process server, in his affidavit categorically says that on 21 September 2012, he says he served it on respondents on 21 September 2012. I

[23] Obviously he could not have served the said notice on 21 September 2012 when the notice of appeal itself is dated 27 September 2012 and was only

served on the SCIT on 27 September 2012.

[24] The respondent's solicitors wrote a letter dated 26 December 2012 to the SCIT informing them that the notice of appeal dated 27 September 2012 was not served on them. This letter was extended to the Director General of Income Tax–see exh A to affidavit Zanariah bt Md Raya's affidavit dated 25 June 2013. The appellant never responded to this letter. This shows the appellant never served the notice of appeal on the respondent.

[25] The appellant also failed to produce the proof of service of the notice of appeal. Mohd Harmizi instead filed an affidavit to say that the acknowledgment was lost. This affidavit be accepted as proof of service of the notice of appeal. Proof of service must be threatened.

[26] I also believe that the notice of appeal was never served on the respondent as:

(a) the said notice of appeal was only addressed to the SCIT and was not copied to the respondent; and

(b) the affidavit of Seri Hanim bt Mohd Ayob dated 19 June 2013 averred that there was no direction to serve the said notice of appeal on the respondent's solicitor except the SCIT.

[27] Therefore the affidavit evidence of Mohd Harmizi that he served the said notice on the respondent is doubtful.

[28] The onus of proof is on the appellant. This onus has not been discharged.

TIME TO SERVE

[29] Although no time limit is provided for under para 35, within which the appellant has to serve a copy of the notice of appeal, by paras 42 and 42A of Schedule 5, it can be implied that the appellant has to serve it on the respondent within the same period for the filing of such notice to the SCIT, that is within 21 days after the service of the Order of the SCIT on the appellant: *Ahmad bin Yahya & Anor v Ahmad bin Sulaiman* [1972] 2 MLJ 109.

CONCLUSION

[30] The time limit to serve the notice of appeal is 21 days from the date the order of the SCIT was served on the appellant (as provided for by para 35 of Schedule 5) Since this notice of appeal was not served on the respondent within the said period, the appeal filed was not properly brought before this court. As

such the application by the respondent is allowed and the appeal is struck out with costs of RM2,000 to the respondent.

Respondent's application allowed and appeal struck out with costs.

Reported by Kanesh Sundrum